***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

75-7552

Docket No. 75-7552

B

SAMUEL SCHEIN, an attorney,

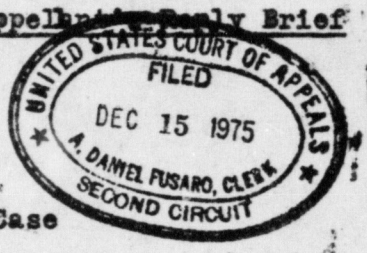
Plaintiff-Appellant,

v.

Appellant's Reply Brief

The U. S. A., et al.,

Defendants-Appellees.




P/S

Statement of the Case

SAMUEL SCHEIN, appellant pro se, an attorney at law, appeals and seeks review of the final decision of Hon. Kevin T. Duffy, U.S.D.J., endorsed September 9, 1975 on the back of defendants' Notice of Motion and Affidavit, "Motion granted So ordered", which dismissed the Complaint.

Plaintiff filed a Complairt praying of the Court "to grant judgment in favor of plaintiff against the defendants in the sum of $750,000., or in such amount as the Court may deem fair, reasonable and equitable, as damages and compensation for causing plaintiff's injuries and heart attack, and prays for such other and further relief as the Court may deem just and proper". The Complaint contains no allegation as to "defendants' purported negligent conduct", nor does it allege any failure "to provide plaintiff with an informant's reward". Item 2 of the Complaint states: "Plaintiff alleges that there was during the years of 1964 and 1965 and thereafter, wrongdoing, corruption and the fixing of a very substantial tax case by President Lyndon B. Johnson and by above named defendants, high officials of the Internal Revenue Service, against the interests of the U. S. government and the plaintiff". The Complaint is founded on defendants' "wrongful acts" as provided in Section 1346 (2) (b), U. S. Code, and on the despicable procedures practiced by the defendants in the handling of this matter, which caused plaintiff's personal injuries.

Facts

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Appellees' Brief, page 2, refers to item 13 of the

Complaint, but does not mention the last two sentences of item 13. Said two sentences read as follows: "However, plaintiff found out that the Service did knock out the claimed tax-loss of $3,192,309. Thus, plaintiff received no credit for his good legal work and came to realize the strict meaning of the condition precedent, contained in the offer of reward, that there must be an actual "recovery of additional taxes".

Appellees' Brief, page 3, 1st paragraph refers to item 26 of the Complaint, and states that the Manhattan District Director, I.R.S., "concluded" that there was "no basis for the allowance of a reward". Attention is called to item 27 of the Complaint which reads as follows: "It is noted that the Service shows no interest in the information that is submitted, does not inquire as to anything further from the Claimant, but the procedure is to move routinely, quickly, perfunctorily to denial of the claim".

Appellees' Brief, page 3, last sentence of 2nd paragraph, refers to item 52 of the Complaint, and states that the Scranton District Director's office "advised" that " a reward is allowable only when original information is furnished". Item 52 of the Complaint reads that the Scranton District Director "wrote a naus eating letter". Attention is called to the paragraph of said letter quoted in item 52 of the Complaint, last paragraph, which reads as follows: "This has been brought to your attention in order that you may understand that your five-page memorandum of law, based on a study and extracts from the Internal Revenue Code of 1954 and the Federal Tax Regulations, has been accepted as "information" furnished in support of your original claim for reward".

Appellees' Brief, page 3, bottom paragraph, refers to items 55-56 of the Complaint, and states that plaintiff "requested reconsideration of the disallowance of his 1958 claim". Item 55 of the Complaint shows that plaintiff "requested recall of the decision disallowing Claim For Reward". Item 56 of the Complaint, in full detail, reads as follows:

"Plaintiff's letter of February 23, 1961 stated:

"It was my legal opinion then, and it is still now, that the subject taxpayers should not be entitled to credit for such tax-loss carry-overs on the ground that same had accrued to other companies which were subsequently taken over by Gera Corp. . . . . It was my claim that such procedures were illegal and should not be permitted by the I. R. S."

"In this connection, I herewith enclose typewritten copy of a newspaper article, showing that the Treasury has very recently proposed new tax regulations interpreting Section 269, which I think are to have retroactive effect, and so will be binding and control the Internal Revenue Service's ruling which should disallow entirely the heretofore mentioned Gera Corporation tax-loss carry-overs credit claims. I think that my information and material submitted to you may have had something to do with the Treasury's promulgation of the said new tax regulations".

"It is hoped that I will be given some credit on my claim for reward herein made in 1958, if and when the I.R.S. disallows the said Gera Corp. tax-loss carry-over credits".

Appellees' Brief, page 3, bottom paragraph refers to items 57-58 of the Complaint. Attention is called to said items 57 and 58, which read as follows:

"February 27, 1961 the N.Y.C? District Director wrote to Claimant:

"Since prior information which you submitted to the Service was sent to the District Director of Internal Revenue, Scranton, Penna., for consideration and processing, your letter and enclosure were forwarded to the Scranton office for association with the case".

"Plaintiff pressed and prodded the Scranton District Director and the I.R.S. continually throughout the year 1961 in efforts to obtain some action and co-operation hereon".

Appellees' Brief, page 3, bottom paragraph, refers to items 88 and 89 of the Complaint. Attention is called to said items, which read as follows:

"May 10, 1965 Claimant wrote to the N.Y.C. District Director:

"It appears that the decision is within your discretion. Most respectfully plead that you grant your kind consideration and assistance to attain said need. Although I have worked so hard on this tax case for more than six years now, have received no consideration therefor. Am in great need of some part of the reward, fee or compensation and am hopeful of obtaining same at this time".

"May 10, 1965, the same day as Claimant's letter, the N. Y. C. District Director wrote to Claimant:

"Since it was correctly determined that your information was not the basis for a reward, this office has no alternative but to affirm the action previously taken in this matter".

Attention is called to item 91 of the Complaint, which alleges as follows:

"Plaintiff's immediate reaction is shown in his letter of May 13, 1965 to the N.Y.C. District Director:

"Received your letter of May 10, 1965 and you will give me a heart attack".

"Your letter of May 10, 1965 is cruel and unconscionable. If your decision stands for the Internal Revenue Service, it is despicable procedure".

"Plaintiff did eventually and inevitably suffer and sustain a nearly fatal acute heart attack, myocardial infarct, on October 31, 1974, directly attributable to the despicable procedure and corruption of the I.R.S., as will be alleged in more detail hereinafter".

Appellees' Brief, page 4, top paragraph, refers to item 93 of the Complaint. The latter item reads as follows:

"July 16, 1965 the response to the Appeal came in a letter from the N.Y.C. District Director, who wrote:

"The basis for the allowance of a claim for reward is the tax recovered attributable to the information submitted by the informant that is not available to the Revenue Service".

"Plaintiff submits that the rendering of his legal opinions and conclusions, the work product of his ability as an attorney hereon, were not available to the Revenue Service".

Appellees' Brief, page 4, top paragraph, refers to items 94 and 95 of the Complaint. Attention is called to said items, which allege as follows:

"Plaintiff submits that the Internal Revenue Service simply reneges on their offer of reward, goes back on their representation and promise to pay".

"August 9, 1965 Claimant wrote to President Johnson, and forwarded a carbon copy to Hon. Robert F. Kennedy, then U. S. Senator from New York State, stating as follows:

"The file reflects quite clearly that the matter has not been processed properly or expeditiously. There has been wrongdoing on the part of the Internal Revenue Service and other high officials".

Appellees' Brief, page 4, last part of top paragraph, refers to item 100 of the Complaint. Attention is called to the 2nd quoted paragraph of item 100, which reads as follows:

"No matter how valuable the information and how large the resulting assessment of additional taxes, if it does not result in actual collection of such taxes there is no reward. Conversely, where additional taxes have been collected but not as a result of the information submitted, no reward is paid for such information".

Appellees' Brief, page 4, bottom paragraph, refers to item 121 of the Complaint, and makes a most erroneous assumption that the instant action alleges "essentially the same facts" as were set forth in a previous suit. Item 121 of the Complaint alleges as follows:

"On February 22, 1972 plaintiff instituted a suit against the U. S. A., Commissioner of Internal Revenue and District Director, New York, N. Y. The theory of said action was that an attorney should be entitled to compensation and a fee for difficult, arduous legal services performed, and in the prayer for relief there was included a request for an allowance and a reward "based on what amount the Court finds that plaintiff earned, is entitled to and should be paid".

The February 22, 1972 Complaint contains no mention of any cause of action for personal injuries, and the Court's decision dismissing that Complaint did not, could not, encompass dismissal of any personal injuries action. The personal injuries complained of in the present action developed and actually occurred during the year 1974, the almost fatal acute heart attack and cereberal infarct took place on and after October 31, 1974.

Appellees' Brief, page 3, middle paragraph, refers to item 130 of the Complaint, and repeats the most erroneous assumption that "The pleaded facts were essentially the same as those alleged in his first action and as alleged in the instant action". It must be pointed out that there was no personal injuries cause in the 1st action. The March 14, 1975 Complaint "commingled a cause of action for breach of an implied contract with an action for injury and negligent wrongdoing". The pleaded facts in the present action were not the same as stated in the 1st Complaint, nor as stated in the March 14, 1975 Complaint. Furthermore, the latter suit was not dismissed on "the Court's own motion". That action was dismissed on consent of the plaintiff because it was shown that no Notice of Administrative Claim had been then served and filed, a jurisdictional prerequisite called for pursuant to 28 U. S. Code, @2675 (a) and (b).

Appellees' Brief, page 5, bottom paragraph, refers to item 3 of the Complaint, and criticizes the withdrawal of

"this administrative claim fifteen days later". Attention is called to item 3 of the Complaint, which alleges as follows:

"An administrative claim, in accordance with 28 U. S. Code @2675 (a) and (b), a jurisdictional prerequisite, was filed via certified mail on June 2, 1975 on Commissioner Donald L. Alexander, I. R. S., and on Edward H. Levi, U. S. Attorney General. Therein, written notice was given that after 15 days, by June 20, 1975, claimant would withdraw the claim from consideration of the federal agency and would commence action under the Federal Tort Claims Act".

Plaintiff was proceeding strictly as provided by Section 2675 (a) and (b). The latter sub-section (b) reads as follows: "The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency".

The original of the Administrative Claim Notice herein, dated June 2, 1975, is stapled to the filed Complaint and is numbered Documents 1 A - B, Index to the Record on Appeal. Therein, via item 11, the last item in the Administrative Claim Notice, shows that:

"Plaintiff hereby gives written notice that after 15 days, by June 20, 1975, he will withdraw this claim from consideration of the federal agency and commence action under the Federal Tort Claims Act, 28 U. S. C. @2671 et seq."

ARGUMENT

Appellees' Brief, page 6, top paragraph, refers to 28 U. S. C. @2680(a), and states erroneously that: "Plaintiff cannot rely upon 28 U.S. C. @1346 (2) (b), however, because of the exclusionary language of 28 U.S.C. @2680(a)". The error and faulty reasoning lies in the fact that plaintiff's tort claim is not based upon "an exercise or performance or the failure to exercise or perform a discretionary function".

Plaintiff's personal injuries action is based on the defendants' "wrongful acts" as provided in Section 1346 (2) (b), U. S. Code, and on the despicable procedures practiced by the defendants in the handling of this substantial tax matter. Plaintiff makes no claim founded on any "abuse of discretion". It is submitted that the exclusionary language of @2680(a) should not be enlarged to include "wrongful acts", corruption and the "fixing" of tax cases, and pay-offs. Plaintiff makes no claim founded on negligent wrongdoing; the instant Complaint does not contain any allegation as to defendants' negligence. It is respectfully submitted that the defendants, the I.R.S. and President Johnson, are not within their rights and power, when they act wrongfully, corruptly and "fix" tax cases. It is respectfully urged that the exclusionary provision of @2680(a) does not apply to defendants' wrongdoing, wrongful acts, corruption and "fixing" of tax cases, nor to the despicable procedures practiced by the defendants in the handling of this substantial tax matter.

Appellees' Brief, page 6, bottom paragraph, wholly misinterprets and misconstrues the true purport of the Complaint. The "premise" that the personal injuries action came about because of the decision of "Government officials in denying him an informant's reward, is without support in the Complaint. The action is brought to recover for personal injuries, and the appellees refuse to address themselves to said action. They have attacked the Complaint as one seeking an informant's reward, and have thus fallen into a trap of their own making.

It is respectfully submitted that all of Appellees' references and citations treat and deal with cases involving informants' claims for reward, and same are immaterial, irrelevant and incompetent in application to plaintiff's Complaint to recover for personal injuries.

Appellees' Brief, page 7, middle paragraph, repeats the erroneous assumption made previously, as to "negligent conduct" and "exercise of discretion" by Government officials.

Appellees' reasoning is faulty in that the Complaint does not contain any allegation as to "exercise of discretion", nor of "negligent conduct".

Appellees' Brief, page 7, middle of page, refers to a "legal conclusion" in the case of Divonne v. Internal Revenue Service, (Ex. 1, Legal Appendix), stating: "Where, as here, the plaintiff sued in tort, claiming the right to an informant's reward". The statement is incorrect, in that here, in plaintiff's instant action, the Complaint is brought to recover for personal injuries and does not contain any allegation "claiming the right to an informant's reward". The Divonne case decision is clearly distinguishable from the instant action. On page 4 of of the Court's decision in the Divonne case, it is stated: "By the Federal Tort Claims Act, the U.S. has waived immunity with respect to certain actions in tort". The opinion goes on to discuss the waiver does not apply as to exercise or performance or the failure to exercise or perform a "discretionary" duty on the part of a federal agency. The key word is "discretionary". In the instant action, it should be pointed out again that the Complaint is based on wrongdoing and corruption, and not on any claim of "abuse of discretion" or "discretionary duty". It is respectfully submitted that the Court's decision in the Divonne case should not apply to the instant Complaint.

Appellees' Brief, page 7, the footnote paragraph, refers statement, that plaintiff "failed to file his administrative claim and receive a denial, or wait six months without receiving a decision". Under the circumstances herein, plaintiff felt that denial of his matter as an administrative claim was a foregone conclusion. To wait another six months, after so many years, for a denial decision, appeared to be useless and unnecessary. Plaintiff moved to follow promptly the provision as stated in @2675(b), U.S. Code, that: "The claimant, however, may upon fifteen days written notice, withdraw such claim from

consideration of the Federal agency and commence action thereon".

Appellees' Brief, page 8, top of page, states erroneously: "Not only is jurisdiction unavailable under 28 U. S. C. @1346 (2) (b), the provision relied upon in plaintiff's Complaint, no other jurisdictional basis may be found to support plaintiff's claim". The fact is that plaintiff's Complaint, item 1, alleges that: "Jurisdiction is founded on Section 1346 (2) (b), U. S. Code, which states that the district courts shall have exclusive jurisdiction of civil actions on claims against the U. S. for money damages and for injury by the negligent or wrongful act of any employee of government".

Plaintiff states specifically that he is proceeding herein solely pursuant to Section 1346 (2) (b) and to the provisions of the Federal Tort Claims Act, Sections 2671 et seq. Accordingly, it is submitted that Appellees' discussion and references to plaintiff's initial suit, Schein v. United States, 352 F. Supp. 182, 186, and to other citations and cases dealing and treating with informants' claims for reward, are inappropriate and inapplicable.

Appellees' Brief, page 9, top of page, commences with a false statement that: "Plaintiff's action is premised on allegations of negligence by defendants". The next sentence is also incorrect, stating that the Complaint "makes clear that the negligent conduct alleged is defendants' . . . . . refusal to provide plaintiff with the informant's reward". It is again pointed out that the Complaint is based on defendants' wrongful acts and despicable procedure, not negligence and not negligent conduct in refusal to provide plaintiff with the informant's reward.

Appellees' Brief, page 9, 11th line from the top, states an erroneous conclusion that: "plaintiff's Complaint does not state a claim sounding in tort at all. See Divonne v. Internal Revenue Service, supra, at p.5." In the Divonne case, the plaintiff claims that he is entitled to a reward. In the

instant action, plaintiff seeks to recover for personal injuries based on wrongful acts and despicable procedures. 28 U.S. Code, 1346 (2) (b) and the Federal Tort Claims Act, Sections 2671, et seq., U. S. Code, do clearly confer subject matter jurisdiction to the Court. Since plaintiff's instant Complaint is brought solely to recover for personal inuries, and not "in the nature of a contract claim", it is submitted that discussion as to any contract claim is inappropriate and inapplicable. All of the long line of decisions, cited in page 9, Appellees' Brief are irrelevant, because plaintiff, in the instant action, does not persist in demands or claims for reward. Plaintiff's Complaint does not seek a reward, nor does the Complaint allege any negligence. Appellees' conclusion that plaintiff's allegations of personal injury fail to state a claim upon which relief can be granted is without support or foundation.

Appellees' Br ief, page 10, Point III, states erroneously that: "The Action is Barred By Res Judicata". Appellees repeat the mistake of of arguing that plaintiff's 1972 action set forth "essentially the same factual allegations as are made in the instant action". The Complaint of February 22, 1972 contained no statement, allegat ion or claim as to personal injuries. In fact, the personal injuries complained of, specifically, ulcers and body skin carcinoma, cereberal infarction and acute myocardial infarction, actually occurred during the year 1974. Plaintiff should stress that the instant Complaint proceeds as a completely, pure tort action, and plaintiff has withdrawn, eliminated and makes no mention of any claimed cause of action based upon express or implied contract. The action to recover for personal injuries is wholly distinct and separate from the 1972 action brought on implied contract and a quantum meruit basis.

Appellees' Brief, page 11, middle of the page, refers to two Ruderer case citations. Neither one of said cases seems

to be applicable or relevant to plaintiff's present Complaint. The instant personal injuries action should not be said to be "clothing the claim in different garb". Plaintiff's present action to recover for personal injuries is not "essentially the same claim" as stated in the initial 1972 action.

page 7,

Appellees' Brief, bottom footnote paragraph, refers to the case of Franklin State Bank v. United States, (Ex. 2 to Legal Appendix) in connection with provisions of 28 U.S.C., @2675(a). Said Exhibit 2 consists of ten pages, wherein the Court discusses that plaintiff has not met the prerequisites set forth in 28 U. S. C. §2675. That action "seeks to recover damages for the allegedly negligent loss"; it was not an action based on wrongful acts, corruption and despicable procedures.

It is submitted that plaintiff in the instant action followed the procedure authorized under Section 2675(a) and (b). This matter was covered fully in this Reply Brief, on page 7 thereof. There should be no question that plaintiff herein did meet and comply with the prerequisites as to Notice of Administrative Claim as set forth in 28 U. S. C. @2675(a),(b).

CONCLUSION

The decision and Order of the U. S. District Court, Southern District of N. Y., dismissing the Complaint is erroneous. Appellant respectfully prays that the decision be reversed and that it be Ordered that the motion to dismiss be denied, and it is prayed that the other and further relief stated in Appellant's Brief, dated October 28, 1975, be granted in all respects.

Dated: Brooklyn, New York
December 15, 1975

Respectfully submitted,

Samuel Schein

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COPY RECEIVED

December 15, 1975

UNITED STATES ATTORNEY